87-1469

Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MAJOR GENERAL WILLIAM A. HORNSBY,
Etc., et al.,

Petitioners

v.

DAVID STINSON

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

1. Does this Court's Opinion in Chappell v. Wallace, 462 U.S. 296 (1983), which held that enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations, preempt the employment of the analysis required under Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971), to determine the justiciability of claims based upon alleged violations of rights protected by 42 U.S.C. Sections 1981 and 1983 filed by discharged military personnel?

PARTIES

In addition to the names contained in the caption, Petitioners include the Alabama National Guard, Major Ernest L. Shipp, individually and as an Officer of the Alabama National Guard; Lt. Col. John Q. Adams, individually and as an officer of the Alabama National Guard; George F. Hulsey, individually and as an officer of the Alabama National Guard. All other parties are named in the caption.

TABLE OF CONTENTS

Page

Opinions Below.....vii

Jurisdiction.....viii

Statement.....1

Reasons for Granting the Petition...4

Conclusion.....14

Appendix A.....A-1 - A-27

Appendix B..... ..B-1 - B-3

Appendix C.....C-1 - C-11

TABLE OF AUTHORITIES

Cases — Page

Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).....i, 4, 6-10

Brown v. United States, 739 F.2d 362, (8th Cir. 1984), cert. denied, _____ U.S._____, 105 S.Ct. 3524, 87 L.Ed.2d 650 (1985).....12

Chappell v. Wallace, 462 U.S. 296 (1983)..... .i, 3-14

Crawford v. Texas Army Nat. Guard, 794 F.2d 1034 (5th Cir. 1986).....11-13

Martelon v. Temple, 747 F.2d 1348 (10th Cir. 1985), cert. denied ___U.S.___, 105 S.Ct. 2675, 86 L.Ed.2d 694 (1985).....12

Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).....i, 3-10, 14

Mollnow v. Carlton, 716 F.2d 627, (9th Cir. 1983), cert denied, 465 U.S. 1100, 104 S.Ct. 1595, 80 L.Ed.2d 126 (1984).....12

Penagaricano v. Llenza, 747 F.2d 55, (1st Cir. 1984).....13

Page

United States v. Shearer, 473 U.S. 52 (1985).....13-14

Statutes:

Civil Rights Act of 1964, 42 U.S.C. 1981.....1, 3

Civil Rights Act of 1964, 42 U.S.C. 1983.....1,3

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V.

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PETITION FOR WRIT OF CERTIORARI TO THE
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FOR THE ELEVENTH CIRCUIT

The Petitioners, Major General William A. Hornsby, etc. et al., respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the United States Court

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*The other parties to this cause are Petitioners the ALABAMA NATIONAL GUARD, MAJOR ERNEST L. SHIPP, individually and as an Officer of the Alabama National Guard; LT. COL. JOHN Q. ADAMS, individually and as an officer of the Alabama National Guard; GEORGE F. HULSEY, individually and as an officer of the Alabama National Guard.

of Appeals for the Eleventh Circuit entered July 20, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987), and is reproduced as Appendix A hereto, infra. The order of the United States Court of Appeals for the Eleventh Circuit denying Petitioners Petition for Rehearing In Banc is not reported and is reproduced as Appendix B hereto, infra. The Opinion and Order of the United States District Court for the Middle District of Alabama, Northern Division, granting Petitioner's Motion to Dismiss is not reported and is reproduced as Appendix B hereto, infra.

JURISDICTION

The Judgment of the United States Court of Appeals for the Eleventh Circuit was entered on July 20, 1987. Petitioner's Petition for Rehearing and Suggestion of Rehearing En Banc was Denied on November 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATEMENT

1. On April 19, 1986, Respondent David Stinson filed a complaint in the United States District Court for the Middle District of Alabama alleging discrimination and seeking relief under Title 42 U.S.C Sections 1981, 1983 and 2000e-2000-17. The Respondent had been on active duty with the Alabama National Guard pursuant to Title 32 U.S.C. Section 502(f) and as such was a full-time uniformed federal member of the military. In his complaint, Respondent named his military supervisors, including the Adjutant

General of Alabama and the Alabama National Guard itself as defendants.

Respondent had filed administrative claims alleging racial discrimination with the United States Department of the Army, which resulted in an investigation within the command structure of the Alabama Army National Guard. On May 13, 1986, the Adjutant General of the Alabama National Guard submitted a final agency decision finding that Respondent had not been a victim of racial discrimination.

Petitioner filed a Motion to Dismiss the complaint, which the District Court granted on the grounds that Respondent had no grounds for relief pursuant to Title VII of the Civil Rights Act of 1964 and that, based

upon this Court's decision in Chappell v. Wallace, 462 U.S. 296 (1983), Respondent had no claim for relief pursuant to Title 42 U.S.C. Section 1981 and 1983.

2. Respondent Stinson appealed the granting of the Motion to Dismiss.

On July 20, 1987, the United States Court of Appeals, Eleventh Circuit, issued an opinion affirming the District Court on the Title VII issue, but remanded the Title 42 U.S.C. Sections 1981 and 1983 issues for analysis under Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

On August 6, 1987, Petitioner petitioned for Rehearing and Suggestion for Rehearing En Banc on the remand of the Title 42 U S.C. Sections 1981 and 1983 issues.

On November 6, 1987, the Eleventh Circuit denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc.

REASONS FOR GRANTING THE PETITION

This case tests the application of this Court's opinion in Chappell. Essentially, if Chappell is held to establish that enlisted military personnel should not be allowed to maintain claims for damages against superior military officers for violations of constitutional rights during the course of their military service, then the limited review afforded by Mindes is no longer applicable for Bivens-type claims.

Mindes employed a factoring analysis to determine the justiciability of constitutional claims asserted by members of the armed forces against their superiors. The Mindes analysis requires a two-step evaluation. First, an internal military decision is nonreviewable unless the plaintiff asserts:

> "(a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation of applicable statutes, or its own regulations and
>
> (b) exhaustion of available intra-service corrective measures."

Mindes, 453 F.2d at 201. Second, the reviewability of the claim must be examined by weighing four factors:

> "1. The nature and strength of the plaintiff's challenge to the

military determination. Constitutional claims, normally more important than those having only a statutory or regulatory base, are themselves unequal in the whole scale of values....

2. The potential injury to the plaintiff if review is refused.

3. The type and degree of anticipated interference with the military function. Interference per se is insufficient since there will always be some interference when review is granted, but if the interference would be such as to seriously impede the military in the performance of vital duties, it militates strongly against relief.

4. The extent to which the exercise of military expertise or discretion is involved...." Id.

The issue before this Court in Chappell was whether military personnel may pursue a Bivens-type action for damages against their superior officers to redress constitutional violations. See Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403

U.S. 388 (1971), (which authorized a suit for damages against federal officials whose actions violated an individual's constitutional rights, even though Congress had not expressly authorized such suits). In Chappell, five enlisted men brought a Bivens-type action against their military superiors claiming that because of their minority race, they were assigned undesirable duties, given low performance evaluations, threatened and given penalties of unusual severity.

The district court dismissed the complaint on the grounds that, inter alia, the actions complained of were nonreviewable military decisions and the Ninth Circuit reversed, requiring the application of a Mindes-type test to determine whether the actions at issue were reviewable by a civilian court. This Court reversed the Court of Appeals

and held that enlisted military personnel may not maintain a Bivens-type action for damages against their superior officers for alleged constitutional violations. Chappell 462 U.S. at 305.

In so holding, this Court recognized that "...the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline...." Id. at 301. Recognizing the necessity to maintain strict discipline and obedience to command within the military structure, the court also held that:

> "[c]civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship

is at the heart of the necessarily unique structure of the military establishment."

Id. at 300. The Court then concluded that "...the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a Bivens-type remedy against their superior officers." Id. at 304.

2. This petition questions the continued application of the Mindes doctrine for Bivens-type claims in light of this Court's decision in Chappell. Chappell suggests that the Mindes test is no longer applicable to determine the justiciability of a claim predicated on Bivens.

Petitioners assert that Respondent's Bivens-type claims should be controlled by Chappell. The analysis required by Mindes conflicts with the reasoning of this Court in Chappell. The very matters that the Court said are not within the proper jurisdiction of the civil courts are required to be examined under the Mindes rule on remand of the instant case. In essence, the district court is required, under Mindes, to intrude into a military personnel decision to determine the justiciability of constitutional claims asserted by a member of the armed forces against his superiors. Such intrusion invites "second-guessing of military actions and tend[s] to overlap the remedial structure created within each service, which, according to Chappell, provides

an exclusive remedy subject to review only under the arbitrary and capricious standard". See Crawford v. Texas Army Nat. Guard, 794 F.2d 1034, 1036 (5th Cir. 1986). Consequently, respondent's alleged constitutional violations and claims based upon 42 U.S.C. Sections 1981 and 1983 are precluded by Chappell. Id.

Respondent seeks injunctive relief in the nature of reinstatement, with retroactive promotion and back-pay, to the Alabama National Guard. This type of relief should be treated no differently under Chappell from a claim for monetary damages. The nature of the lawsuit, rather than the relief sought, determines justiciability. Indeed, to allow an injunctive-relief exception to Chappell would only serve to swallow

Chappell's rule of deference. Crawford 794 F.2d at 1036.

There is a growing body of precedent following Chappell. The Fifth Circuit in Crawford noted that the Eight Circuit Court of Appeals, the Tenth Circuit Court of Appeals, and the Ninth Circuit Court of Appeals had "declared off limits Section 1983 claims by National Guard personnel", Brown v. United States, 739 F.2d 362, 366-67 (8th Cir. 1984), cert. denied, _____ U.S. _____, 105 S.Ct. 3524, 87 L.Ed.2d 650 (1985); Martelon v. Temple, 747 F.2d 1348, 1350-51 (10th Cir. 1984), cert. denied ____U.S.____, 105 S. Ct. 2675, 86 L.Ed.2d 694 (1985); Mollnow v. Carlton, 716 F.2d 627, 629-30 (9th Cir. 1983), cert. denied, 465 U.S. 1100, 104 S.Ct.

1595, 80 L.Ed.2d 126 (1984), Crawford 794 F.2d at 1036.

In addition to the instant case, only the First Circuit Court of Appeals has held that Chappell does not directly preclude the justiciability of a constitutional claim. See Penagaricano v. Llenza, 747 F.2d 55, 59 (1st Cir. 1984).

Petitioners urge that the instant facts present the same kind of case found nonjusticiable in Chappell and Crawford. As this court stated in United States v. Shearer, 473 U.S. 52, (1985):

> "To permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions, for example, whether to overlook a particular

> incident or episode, whether to discharge a serviceman and whether and how to place restraints on a soldier's off-base conduct."

Shearer, 473 U.S. at 58.

CONCLUSION

Because there is conflict and confusion between decisions of the Courts of Appeal regarding the application of Chappell, and because the instant case presents an important question regarding the continued applicability of the Mindes doctrine in light of this Court's decision in Chappell, certiorari should be granted.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL

ROBERT L. RASH
ASSISTANT ATTORNEY GENERAL

APPENDIX A

Opinion of the United States

Court of Appeals

For the Eleventh Circuit

No. 86-7508

Entered: July 20, 1987

Before HILL, HATCHETT and HENDERSON, Circuit Judges.

HATCHETT, Circuit Judge:

On October 1, 1982, the Alabama National Guard employed David Stinson, a black resident citizen of Montgomery County, Alabama, on a full time basis, as Training NCO/System Supervisor. It terminated him on September 29, 1985. Stinson alleged that the Alabama National Guard prohibited and refused to allow him the opportunity to gain a supervisory position, allowed white

employees, with equal or fewer qualifications and experience, to gain supervisory positions, and allowed a less qualified white employee to act as supervisor over him. Stinson contends that his termination was due to racial discrimination.

FACTS

On September 5, Stinson filed a complaint alleging racial discrimination with the Department of the Army. On September 5, 1985, the complaint was received by Nelson V. Wood, Chief, The Army, National Guard Bureau, Washington, D.C. On November 5, 1985, Lt. Col. George Beck was directed to conduct a factual investigation of Stinson's complaint. On May 13, 1986, Maj. Gen. William Hornsby, Adjutant General, Alabama, submitted a final agency decision finding no discrimination.

PROCEEDINGS IN THE DISTRICT COURT

On April 19, 1986, Stinson filed a complaint in the United States District Court for the Middle District of Alabama, alleging discrimination and seeking relief under 42 U.S.C. Sections 1981, 1983, and 2000e-2000e-17. Stinson's complaint alleged that the Alabama National Guard engaged in racially discriminatory employment practices which had a disparate impact on him. Stinson contends that such discriminatory acts and practices violated his rights to due process and equal protection under the fourteenth amendment and his federal rights under Title VII, 42 U.S.C. Sections 2000e-2000e-17.

On April 30, 1986, General Hornsby moved to dismiss Stinson's complaint,

asserting that the district court was without jurisdiction under Title VII because Stinson had failed to exhaust administrative remedies; the military decision not to renew Stinson's tour of duty was nonreviewable; and the court was without subject matter jurisdiction to review Stinson's claim of racial discrimination against his military superiors.

In dismissing the complaint, the district court held that because Stinson was a full-time uniformed employee on military duty with the Alabama National Guard, Stinson had no claim for relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. Sections 2000e-2000e-17. The district court also held that based upon Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586

(1983), Stinson had no claim for relief pursuant to 42 U.S.C. Sections 1981 and 1983.

DISCUSSION

Stinson claims that the district court erred in finding that both causes of action alleged in his complaint failed to state a claim upon which relief could be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6), and subsequently in dismissing the complaint.

On appeal, we accept as true the allegations in Stinson's complaint in order to determine whether Stinson sufficiently stated a cause of action under Title VII or sections 1981 and 1983. Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

A. Title VII Claim

[1] In 1964, Congress enacted

legislation that authorized members of the National Guard to perform additional training and duty beyond their regularly scheduled drills and periods of active duty. Title 32 U.S.C. Section 502(f); Pub.L. No. 88-621, Section 502(f), 78 Stat. 999, 1136 (1964).[1] Stinson was on full-time military duty with the Alabama National Guard pursuant to section 502(f) during the period of the misconduct alleged in this case.

In Taylor v. Jones, 653 F.2d 1193, 1200 (8th Cir.1981), the court, in declaring Title VII inapplicable to

1. The purpose of the enactment is to "provide protection for members of the National Guard who incur disability while they are (1) performing training or other authorized duty that is in addition to the regularly scheduled drills of their units, or the annual periods of 15 days of active duty for training...." S.Rep. No. 1584, 88th Cong., 2d Sess. 110 (1964), reprinted in 1964 U.S. Code Cong. & Admin. News 3800.

persons enlisted in the Armed Forces of the United States, including the National Guard, stated:

> We have previously held that 'neither Title VII nor its standards are applicable to persons who enlist or apply for enlistment in any of the Armed Forces of the United States.' [Citation omitted.] We do not see any significant distinction, for Title VII purposes, between a member of the Army or Air Force and a member of the reserve component of those forces, the National Guard. In neither case is the relationship between the government and the member that of employer-employee; military service differs materially from civilian employment, whether public or private, and is not appropriately governed by Title VII. [Citation omitted.].

In Gonzales v. Dept. of the Army, 718 F.2d 926 (9th Cir. 1983), the court noted that the "military departments" consist of civilian employees, whereas the "armed forces" include uniformed military personnel, a distinction intended by Congress.

Stinson contends that because the Alabama National Guard is a state agency, it follows that an employer/employee relationship is created with the state. Stinson, however, was a uniformed member of, and on full-time military duty with, the Alabama National Guard. Title 10 U.S.C. Section 101 defines "armed forces" to include the Army, Navy, Air Force, Marine Corps, and the Coast Guard. Under 10 U.S.C. Section 3062(c)(1), the Army consists of:

> 1. The Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States, and the Army Reserves.

Other factors support the district court's determination that Stinson, for purposes of Title VII, should be considered military personnel, rather than

an employee of the state of Alabama: (1) Stinson wore a military uniform during periods of active duty and/or training; (2) he served on full-time military duty; (3) he was paid by the federal government and not by the state of Alabama; and (4) he was subject to military discipline on a daily basis. Thus, we conclude that Stinson, a member of the National Guard, is not an employee of the state of Alabama for purposes of Title VII. Compare Calhoun v. Doster, 324 F.Supp. 736 (M.D.Ala.1971) (district court found the distinction between defendant's state and federal positions blurred and

artificial).[2]

We recognize that the finding that Stinson is more military personnel than state employee is a close one. Such a finding, however, does afford Stinson the same treatment and remedies as those with whom he worked full time.

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2. The district court did not find that Calhoun's military position in the Alabama Air National Guard also established an employer/employee relationship with the state of Alabama as Stinson urges in this case. The district court ruled that "the defendant's military authority over the plaintiff is so inextricably intertwined with their civilian authority over him as to render any distinction between 'federal' and 'state' one of form, not substance." Calhoun, 324 F.Supp. at 740. Unlike Stinson, Calhoun held two separate and identifiable position: one as a civilian employee and the the other as military personnel.

2. Sections 1981 and 1983 Claims

[2] The Supreme Court in Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983), held that enlisted military personnel are precluded from maintaining suits against superior officers to recover damages for injuries resulting from violations of constitutional rights in the course of military service. The Supreme Court in Chappell continued by noting that

> 'our citizens in uniform may not be stripped of basic rights simply because they doffed their civilian clothes.' [Citation omitted.] This Court has never held, nor do we how hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service.

Chappell, 462 U.S. at 304, 103 S.Ct. at 2367. The court in Gonzales, stated that "[i]mplicit in the court's order

of remand is the recognition that, in some situations at least, uniformed members of the armed services may assert that their constitutional and statutory rights have been violated by their superiors." Gonzales, 718 F.2d at 929.

The Fifth Circuit in Mindes v. Seaman, 453 F.2d (5th Cir.1971), employed a factoring analysis to determine whether a particular constitutional claim asserted by members of the armed forces against their superiors are barred from suit. The Mindes analysis requires an independent two-step evaluation. First, an internal military decision should not be reviewed unless the plaintiff asserts:

> (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation

of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures.

Mindes, 453 F.2d at 201. Second, the reviewability of the claim must be examined by weighing the following four factors:

> 1. The nature and strength of the plaintiff's challenge to the military determination. Constitutional claims, normally more important than those having only a statutory or regulatory base, are themselves unequal in the whole scale of values....
>
> 2. The potential injury to the plaintiff if review is refused.
>
> 3. The type and degree of anticipated interference with the

military function. Interference per se is insufficient since there will always be some interference when review is granted....

4. The extent to which the exercise of military expertise or discretion is involved.

Mindes, 453 F.2d at 201.

We find the approach adopted in Mindes binding in this action. The record does not indicate that the district court employed the Mindes test to determine whether Stinson's sections 1981 and 1983 claims were barred because of the military personnel exemption. Therefore, we reverse and remand to the district court with instructions to employ the Mindes test in determining whether Stinson's sections 1981 and 1983 claims are barred. Noting that the Mindes test provides for an evaluation

regarding exhaustion of available administrative remedies, we decline to address that issue now.

Our holding today is that members of the National Guard are generally employees of the state; but where the facts indicate that the person is on full-time military duty and other factors indicate that the person is more military than civilian, no Title VII action may be brought. As to other types of actions brought under statutes addressing discrimination, we hold only that the National Guard full-time member plaintiff must have the allegations of the complaint tested by the Mindes standard. Accordingly, we affirm in part, reverse in part, and remand.

AFFIRMED in part, REVERSED in part, and REMANDED.

HENDERSON, Senior Circuit Judge, specifically concurring:

I write separately to suggest that remand of the plaintiff's constitutional claims based on 42 U.S.C. Sections 1981 and 1983 for analysis under Mindes v. Seamen, 453 F.2d 197 (5th Cir.1971) may be unnecessary in light of the Supreme Court's rationale in Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983). I concur in the decision of the panel, however, in deference to the precedential weight of Mindes. I take this opportunity to call attention to the recent interpretation of Chappell by the Fifth Circuit Court of Appeals, finding claims such as these nonjusticiable without resort to the cumbersome Mindes analysis, in the hope that this matter might be reexamined en banc and the utility of the Mindes test

reconsidered in light of more recent Supreme Court decisions.

In Chappell, enlisted military men brought an action against their superior officers seeking damages, declaratory judgment, and injunctive relief for alleged racial discrimination in assignments and performance evaluations. The Supreme Court of the United States analyzed the direct constitutional challenges in terms of whether they stated a cause of action under Bivens v. Six Unknown Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Analogizing to the doctrine established in Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), which held that the United States is not liable, under the Federal Tort Claims Act, for injuries to military personnel which "arise out of

or are in the course of activity incident to service," Id. at 146, 71 S.Ct. at 159, 95 L.Ed. at 161, the Court concluded that the unique disciplinary structure of the military establishment and Congress' activity in the field of military justice made it inappropriate to provide a Bivens-type remedy in this context. The Court stated:

> [J]udges are not given the task of running the Army. The responsibility for setting up channels through which... grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters.

Chappell, 426 U.S. at 301, 103 S.Ct. at 2366, 76 L.Ed.2d at 591 [quoting Orloff

v. Willoughby, 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed. 842 (1953)]. The Court further found that:

> Congress has exercised its plenary constitutional authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure. The resulting system provides for the review and remedy of complaints and grievances such as those presented by respondents.

Id. at 302, 103 S.Ct. at 2367, 76 L.Ed.2d at 592.

The Court echoed these concerns in United States v. Shearer, 473 U.S. 52, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985), while defending the Feres doctrine, concluding:

> To permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions, for

> example, whether to overlook a particular incident or episode, whether to discharge a serviceman and whether and how to place restraints on a soldier's off-base conduct.

Id. at 58, 105 S.Ct. at 3044, 87 L.Ed.2d at 45.

The Fifth Circuit Court of Appeals, without relying on the two-part Mindes analysis, recently determined that Chappell and Shearer preclude judicial cognizance of constitutional claims brought by national guardsmen. In Crawford v. Texas Army National Guard, 794 F.2d 1034 (5th Cir. 1986), two members of the Texas Army National Guard brought suit against the Guard, the governor of Texas and twelve military personnel alleging violations of their rights under the Constitution and 42 U.S.C. Sections 1983 and 1985(2). The plaintiffs asserted that, in retaliation

for reporting criminal activity and racial discrimination by the Guard, they were dismissed or removed from active duty. The Fifth Circuit Court of Appeals affirmed the district court's dismissal of the action pursuant to Fed.R.Civ.P. 12(b)(6), finding no significant difference between such claims and those held impermissible in Chappell. The Crawford court reasoned that the constitutional due process and section 1983 causes of action advanced by the plaintiffs required "judicial second-guessing of military actions" and interfered with the military system of justice established within each service to the same extent as the Bivens claims rejected in Chappell. The section 1985(2) allegations were dismissed under the same rationale. Id. at 1036. The

appellate court declined to except the plaintiffs' prayers for injunctive relief from the reach of Chappell, finding that such an exception would "swallow" Chappell's rule of deference. Therefore, the court held that suits for injunctive relief, like those for money damages, must be carefully regulated to prevent intrusion into the military structure. Id. at 1037.

Conspicuously absent in Crawford is any application of the Mindes test for adjudicating charges of civil rights violations.[1] Clearly, the Court must

1. The Crawford court, in noting that several other circuits have found Section 1983 causes of action by national guardsmen nonjusticiable, specifically refers to the First Circuit's reliance on the Mindes test in addressing this question in Penagaricano v. Llenza, 747 F.2d 55, 59 (1st Cir.1984). Therefore, the Fifth Circuit

have found that the Supreme Court's opinions in this area are controlling. The instant facts present the same kind of case found nonjusticiable in Crawford and Chappell. Stinson's claims for reinstatement, back pay and injunctive relief under 42 U.S.C. Sections 1981 and 1983,[2] are challenges to military

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knowingly rejected the Mindes analysis in the context of Sections 1983 and 1985(2) claims for money damages. Nor is there any indication that the Crawford court applied Mindes to the guardsmen's request for injunctive relief.

2. Although Stinson is an employee of the federal government for purposes of Title VII, his charges of due process violations under Section 1983 against the Alabama National Guard, the Adjutant General, and other officers of the Guard appear to satisfy the state action requirement of Section 1983 since the Guard is a hybrid state-federal venture. See generally, New Jersey Air Nat'l Guard v. Fed. Labor Rel. Auth., 677 F.2d 276, 278-79 (3d Cir.1982); Ala.Code Sections 31-2-1 through 31-2-3(1975).

personnel decisions which would require a court to review his commanding officers' decisions concerning the promotion and dismissal of his men, determinations particularly dependent on the exercise of military discretion. Furthermore, Stinson had an opportunity to assert his grievances within the military system of justice, an opportunity which the defendants assert he has yet to exhaust. The military concerns found compelling in Chappell are equally present here. Therefore, Chappell can be read to support of the district court's dismissal of these claims on their face.

Although the Chappell decision expressly left open the right of military personnel to bring

constitutional grievances to court, there can be little doubt that such access does not extend to "discrete personnel matters." Crawford , 794 F.2d at 1036. Bodly stating this conclusion, as the Fifth Circuit Court of Appeals has done, without requiring the district courts to address the Mindes test would bring this circuit closer in line with the Supreme Court on this issue and would perhaps be fairer to potential litigants. In my opinion, the Crawford decision is a better approach for determining the propriety of hearing military disputes in our courts.[3]

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3. A more recent decision of the Fifth Circuit Court of Appeals casts some doubt on that circuit's position with respect to the Mindes test. In Holdiness v. Stroud, 808 F.2d 417 (5th Cir. 1987), the court affirmed the

HILL, Circuit Judge, dissenting.

The opinion for the panel by Judge Hatchett and the special concurring opinion of Judge Henderson illuminate this issue and the interplay of precedent. I can add nothing of value to the discussion.

I conclude that Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed. 586 (1983) directs the district court's

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dismissal of the plaintiff's action brought pursuant to Section 1983 and Section 1985 for failure to state a claim upon which relief could be granted. The suit was brought by a former member of the National Guard who sought damages from his superior officers for violation of federal constitutional and statutory rights when he was barred from reenlisting and terminated from his employment as a civil technician. The district court dismissed the § 1983 claims against four of the officers named in the complaint on the grounds that they were federal employees and thus, there was no state action. The plaintiff appealed. In addressing the plaintiff's § 1983 claim, the court found the requisite state action but noted that the Crawford decision held that § 1983 does not provide a cause of action for service connected disputes. The

dismissal of this case and I would, therefore, AFFIRM.

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court, however, also referred to the First Circuit's opinion in Penagaricano, 747 F.2d 55, which applied the Mindes test in such instances. The Holdiness court then stated: "[w]e follow Crawford in applying the Chappell rule to Guard members, and using the tests in Chappell and Mindes, hold that the remedy sought by Holdiness would be so disruptive to military service that the claim should not be entertained by the federal courts." Holdiness, 808 F.2d at 423. The court did not remand the case to the district court for consideration terminated from his employment as a civil technician. The district court dismissed the Section 1983 claims against four of the officers named in the complaint on the grounds that they were federal employees nd thus, there was no state action. The plaintiff appealed. In addressing the plaintiff's Section 1983 claim, the court found the requisite state action but noted that the Crawford decision held that Section 1983 does not provide a cause of action for service connected disputes. The of the Mindes factors, evidently finding that step unnecessary in light of Crawford and Chappell.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 86-7508

DAVID STINSON,

Plaintiff-Appellant,

versus

MAJOR GENERAL WILLIAM A. HORNSBY, individually and as th adjutant General of the Alabama National Guard, State of Alabama, THE ALABAMA NATIONAL GUARD; MAJOR ERNEST L. SHIPP, individually and as an officer of the Alabama National Guard; LT. COL. JOHN Q. ADAMS, individually and as an officer of the Alabama National Guard; GEORGE F. HULSEY, individually and as an officer of the Alabama National Guard,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Alabama

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ON PETITION FOR REHEARING AND
SUGGESTION OF REHEARING IN BANC
(Opinion July 20, 1987 , 11 Cir.,
____F.2d____).
(Nov. 6, 1987)

Before HILL, HATCHETT, Circuit Judges, and HENDERSON, Senior Circuit Judge

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing In Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule

35-5), the Suggestion of Rehearing In Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judgess in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

SIGNED
JOSEPH W. HATCHETT
United States Circuit Judge

APPENDIX C

ORDER OF THE U. S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

NO. 86V-385-N

Entered: June 16, 1986

ORDER

In accordance with the Opinion entered in the above-styled cause on this date, it is

ORDERED by this Court that Defendants' motion to dismiss filed herein April 30, 1986, as amended May 16, 1986, be, and the same is hereby, granted and the above-styled cause is hereby dismissed with costs taxed against the Plaintiff, for which execution may issue.

It is further ORDEREED by this Court that Plaintiff's motion to compel filed herein May 30, 1986, be and the same is hereby, denied as moot.

DONE this 16th day of June, 1986.

SIGNED

ROBERT E. VARNER
UNITED STATES DISTRICT JUDGE

OPINION OF THE U. S. DISTRICT COURT

FOR THE MIDDLE DISTRICT OF

ALABAMA

NORTHERN DIVISION

No. 86V-385-N

Entered: June 16, 1986

OPINION

This cause is now before the Court on the Defendants' motion to dismiss

filed herein April 30, 1986, as amended May 16, 1986. Having considered Defendants' motion to dismiss, this Court is of the opinion that, for the reasons expressed below, the same is due to be granted.

FACTS

On April 9, 1986, Plaintiff filed herein the instant complaint alleging that he had been discriminated against by the Defendants on account of Plaintiff's race. Pursuant to said complaint, Plaintiff invoked the jurisdiction of this Court under 28 U.S.C. Sections 1331, 1343(3) and (4) and 42 U.S.C. Sections 2000-5(e), et seq. Plaintiff seeks relief under 42 U.S.C. Sections 1981, 1983 and 2000e(a)(1)(2).

Plaintiff, a black resident citizen of Montgomery County, Alabama, alleges that on October 1, 1982, he became employed by Defendant Alabama National Guard (167th Data Processing Unit) on a full-time basis as a Training NCO/System

Supervisor. Plaintiff further says that, at the time of his termination on September 29, 1985, he remained in said position as a result of Defendants' having prohibited and refused "to allow plaintiff the opportunity to gain a supervisory position while at the same time allowing white employees with the same or fewer qualifications and experience to gain such supervisory positions including allowing a less qualified white employee to be promoted and act as supervisor over plaintiff." Additionally, Plaintiff alleges that "the defendants have engaged in racially discriminatory employment practices which have had a disparate impact on plaintiff" and that the individual Defendants "knew or should have known of said practices and should have stopped

the same." As a result of such, Plaintiff contends that the alleged discriminatory acts and practices of Defendants have violated "his rights to due process and equal protection of the laws under the 14th Amendment and his federal right under Title VII [42 U.S.C. Section 2000(e)] not to be discriminated against because of his race."

Pursuant to their motion to dismiss, the Defendants contend that, as to each cause of action stated in Plaintiff's complaint, the same fails to state a claim upon which relief can be granted. Specifically, the Defendants contend (1) that Plaintiff has no claim for relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e, et seq., and (2) that, under the

doctrine enunciated in Chappell v. Wallace, 462 U.S. 296, 103 S.Ct. 2062, 76 L.Ed.2d 586 (1983), Plaintiff has no claim for relief under 42 U.S.C. Sections 1981 or 1983.

CONCLUSION

A. Plaintiff's Claim Under 42 U.S.C. Sections 2000e, et seq. As stated above, Plaintiff claims that 42 U.S.C. sections 2000e, et seq., provides him a cause of action for the alleged racial discrimination suffered by Plaintiff with respect to job promotions and termination from his full-time employment with Defendant Alabama National Guard. This Court cannot agree.

It appears well settled that the intention of Congress was to exclude military personnel from the purview of Title VII. As a result, courts have

uniformly held that neither Title VII nor its standards are applicable to members of the Armed Forces or members of the reserve components of those forces. See, Taylor v. Jones, 653 F.2d 1193 (8th Cir. 1983); Helm v. California, 722 F.2d 507 (9th Cir. 1983); Gonzales v. Department of the Army, 718 F.2d 926 (9th Cir. 1983; Johnson v. Alexander, 572 F.2d 1219 (8th Cir.), Cert.den. 439 U.S. 986, 99 S.Ct. 579, 58 L.Ed.2d 658 (1978).

Accordingly, this Court is of the opinion that, since at all times relevant hereto Plaintiff was a full-time uniformed employee on

military duty with the Alabama National Guard,[1] then upon the basis of the foregoing authorities, Plaintiff has no claim for relief pursuant to 42 U.S.C. Sections 2000e, et seq.

B. Plaintiff's Claims Under 42 U.S.C. Sections 1981 and 1983. Finally, Plaintiff states causes of action pursuant to 42 U.S.C. Sections 1981 and 1983 for the alleged discriminatory conduct of the Defendants. Likewise, Defendants contend that, pursuant to Chappell v. Wallace, supra, Plaintiff has no claim for relief under either

1. At oral argument of Defendants' motion, heard in open Court on June 6, 1986, the parties stipulated that Plaintiff was a full-time uniformed employee of and on active duty with the Alabama National Guard.

Section 1981 or Section 1983. This Court agrees.

In Chappell, the United States Supreme Court considered the issue of whether enlisted military personnel may maintain suits to recover damages from senior officers for injuries sustained as a result of violations of constitutional rights in the course of military service. In holding that such actions were not available to military pesonnel, the Court held that the unique disciplinary structure of the military and Congress' previous activity in this area constituted "special factors" militating against recognition of a Bivens-type remedy for servicemen against their superiors. See, Chappell, supra, at 2366-2367. See also, Mollnow

v. Carlton, 716 F.2d 627 (9th Cir. 1983) and Holderfield v. Greene, Civil Action No. 83-G-1655-S (ND Ala. 1983), for application of the Chappell doctrine to members of the National Guard.

Accordingly, based upon the Chappell ruling, this Court is of the opinion that Plaintiff has no claim for relief pursuant to 42 U.S.C. Sections 1981 and 1983.

Therefore, Plaintiff's complaint is due to be dismissed in its entirety. An Order will be entered in accordance with this Opinion.

DONE this 16th day of June, 1986.

SIGNED
ROBERT E. VARNER
UNITED STATES DISTRICT JUDGE